In the Supreme Court of the United States.

DECEMBER TERM, 1868.

UNITED STATES, *Plaintiffs in Error*,
vs.
CHARLES HARE, *et al.* } No. 215.

In error to the Circuit Court of the United States for the District of California.

STATEMENT.

This is an action of ejectment, brought in the Circuit Court for the district of California, to try the title of the United States to two lots (numbered 5 and 6) in a block of land in the city of San Francisco, of which a diagram is given on page 13 of the Record. This block is included in what is known as the Rincon Point reservation. The present United States Marine Hospital at Rincon Point and the buildings connected therewith are situated upon lots numbered 1 and 2, 3 and 4, of the same block, and within the same reservation. The defendants are in possession of lots 5 and 6, claiming title adversely to the United States; and this action was brought to establish the title of the government to them. It is admitted that the United States have a valid title to lots numbered 1, 2, 3, and 4, by virtue of the reservation;

the only question in this case being as to their title to the remaining lots, 5 and 6. The case was tried below without a jury, and the court has certified certain findings of fact and conclusions of law, which are contained in the Record, (pp. 5–11 and p. 11.) The court will also find in the Record the opinion of the learned circuit judge, in which the facts of the case and questions of law thereon arising are clearly stated. (Record, pp. 24–31.) The judgment of the court below was in favor of the defendants, and the United States have sued out the present writ of error.

ARGUMENT.

The defendants claim title under the city of San Francisco.

The United States claim—

I. That the city of San Francisco never had or acquired any title to the land in question.

II. That if the city ever had any title to these lots, it was transferred to the United States by deed, dated December 11, 1852, which conveyed a title prior and superior to that under which the defendants claim.

FIRST POINT.

The city of San Francisco never had or acquired any title to the land in question.

1. The title to this land was not confirmed to the city of San Francisco by the *decree in the Pueblo case*, but

was expressly "excluded from the confirmation to the city," inasmuch as it was included in one of the "deductions" to be made from the area of four leagues confirmed to the city by that decree, under this description, namely: "such parcels of land as have been heretofore reserved or dedicated to public uses by the United States." (Record, p. 9.)

We contend that the lots in controversy are embraced within the fair interpretation of the meaning of the phrase in the decree in the Pueblo case—*reserved or dedicated to public uses*. After stating the history of the action of the military officers of the United States in making a reservation at Rincon Point, and the subsequent action of the government in erecting a marine hospital on a portion of that reservation, the learned circuit judge, in his opinion, proceeds as follows: "It is very clear, from this statement of the action of the military officers of the United States, that there was no *valid* reservation for public purposes made by them of the tract at Rincon Point." (Rec. p. 28.) The learned judge then proceeds: "Such appropriation of the public lands could only have been made by act of Congress, or order of the President, and it is not pretended that any such act was passed, or any such order was made, in the present case." (Rec. p. 29.) But we contend, *firstly*, that the question under the decree in the Pueblo case is, whether, *in point of fact*, the land in controversy was reserved or dedicated to public uses on behalf of the United

States prior to the date of the decree, May 18, 1865, and not whether such reservation or dedication to public uses was made under act of Congress or by order of the President. We contend that if, *in fact*, this land *was* reserved or dedicated to public uses by any officer or officers of the government acting for or on behalf of the United States, it is within the terms of the exception in the decree in that case, and it did not pass to the city under the decree; and the United States hold the land by their original title. But if it be necessary to go further and show that there was a valid reservation, in the sense contended for by the learned circuit judge, we contend, *secondly*, that the military governor of California had authority, under the doctrine of this court in the case of Cross *vs.* Harrison, (16 How. 181,) to make a valid reservation of lands for public uses in that Territory; and that such reservation was confirmed and ratified by the subsequent action of the government in selecting a portion of it as a *site* for a marine hospital, and in erecting the present marine hospital thereon, and by various acts of Congress in relation thereto; and that such confirmation and ratification sanctioned the action of the military governor and affirmed "*that he had legal authority for his acts.*" (16 Howard, 201.)

Firstly. That the true construction of the decree in the Pueblo case is, that it excepts from the confirmation to the city all lands which had been theretofore *actually* reserved or dedicated to public uses, would seem to be, independently of the opinion of the circuit court, too

clear for argument. The decree does not declare that the reservations or dedications therein excepted from the confirmation to the city must have been made by "*valid authority;*" nor does it declare that the lands reserved or dedicated to public uses must have been "*actually occupied*" by the United States; and yet, the conclusion of the court below cannot be sustained, it would seem, without assuming that these limitations are contained in it. The decree, in clear and explicit terms, excepts from confirmation to the city "such parcels of land as *have been* heretofore *reserved or dedicated* to public uses by the United States." There is scarcely room here for construction. The words point to a *fact*. They are not to be treated as used in any special or technical sense, which would limit the exception to the injury or prejudice of the United States. That exception obviated objections to the decree on the part of the government, and was manifestly intended to save and protect all its rights of property within the limits of the confirmation. This consideration shows that any narrow construction of the exception, based upon a special or technical interpretation of its terms, is contrary to the spirit of the decree, and would defeat the purpose for which it was made.

The question, then, being one of fact, namely, whether this land was actually reserved or dedicated to public use, the record establishes it conclusively in favor of the United States.

Secondly. But, as before stated, we contend that there

was here a *valid reservation* of all the land embraced by the order of Colonel Mason relative to the reservation at Rincon Point. (Rec. pp. 12, 13.)

It will be observed that the *four lots* on which the government has built, are held by the same reservation as that under which the two lots in question are claimed; and it is difficult to see how the United States can have a valid title, by virtue of Mason's reservation, to the former, and yet not have a valid title to the latter. Colonel Mason, as the executive of the government established in California, made the reservation under the same general and extensive authority by which he appointed an officer to collect duties at San Francisco, (Cross *vs.* Harrison, p. 184;) and if this court can find, from the evidence in the Record, that Congress impliedly ratified or affirmed his action in that regard, Congress must be taken as having sanctioned it, and as having affirmed that he had legal authority for his acts.

This is the same doctrine as that applied by this court in the cases of duties collected under the authority of this same officer while military governor of California.

Our position upon this branch of the case is—

(1.) That, under the authority vested in the military governor, Colonel Mason, at the time, by the laws of war and the orders of the President, he had power to reserve these lands for the public use of the United States, subject to the superior and paramount authority of the President or of Congress to disaffirm or disavow his action in that regard.

(2.) That unless it is found as a fact in this case that the President or Congress did so disaffirm or disavow his action in that regard, the reservation made by the military governor is to be taken as made by valid authority of the United States, and as good against the city of San Francisco and those claiming under her.

(3.) That there is no evidence in this Record, or that is cognizable by this court, showing that either the President or Congress did disaffirm or disavow the action of the military governor of California in reserving this land for public use; and,

(4.) That the evidence shows affirmatively that the President and Congress have both adopted and ratified this action of the military governor.

(1 and 2.) The authority of Cross *vs.* Harrison, already cited, and of the case of Leitensdorfer *vs.* Webb, (20 Howard, 176,) we claim establish the first and second of these propositions.

They show that the military commander, representing the United States in the conquered territory of California and New Mexico, was vested not only with the civil executive authority of the United States, but with all the powers of government over the persons and property of the subject country; and that in the exercise of that extensive power, all that was done by the military commander is to be regarded in law as well and lawfully done, under the valid authority of the United States, as conqueror and sovereign ruler by the right of conquest and the laws of war.

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Say the court in Cross *vs.* Harrison:

"Early in 1847 the President, as constitutional commander in chief of the army and navy, authorized the military and naval commanders of our forces in California to exercise the belligerent rights of a conqueror, and to form a *civil government* for the conquered country, and to impose duties on imports and tonnage as military contributions for the support of the government, and of the army which had the conquest in possession. * * *

"*The government of which Colonel Mason was the executive*, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. * * *

"Our conclusion from what has been said is, that the civil government of California, organized as it was from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification."

The application of these observations to the case at bar is manifest. They clearly indicate the attitude in

which the United States stood to this territory at the time in question, and the authority of Colonel Mason as the representative and organ of the government in that country; and clearly point to this conclusion, that what he did in the exercise of that authority, is to be taken as having the same validity as if it had been directly done by the President or by authority of Congress.

Under the same general authority, General Kearney, the predecessor of Colonel Mason, as the executive of this belligerent government, ordained laws and instituted a judicial system, and suits instituted in the courts of this provisional government were transferred afterwards to the courts established by the territorial government, with the same effect as if the provisional government established by the military power of the United States had been constituted under express authority of Congress.

This court, in the case of Leitensdorfer *vs.* Webb, (20 Howard, 176,) says, speaking of the Kearney code:

"Of the validity of these ordinances of the provisional government, there is made no question with respect to the period during which the territory was held by the United States as occupying conqueror, and it would seem to admit of no doubt that during the period of their valid existence and operation, these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them."

If courts deriving their authority from the ordinances of a military commander could take jurisdiction of persons and property, and exercise full judicial power over all their rights, *à fortiori* that military commander could, in the exercise of his implied powers of sovereignty, reserve from out of the conquered territory such portions of land as he deemed necessary for public use, and his action in that regard, not disavowed or disaffirmed by his government, should be recognized as valid by the judicial authorities of the United States.

(3.) We say that neither the President nor Congress disaffirmed his action, and we say, further—

(4.) That both impliedly adopted and ratified it.

We say the President ratified the action of the military commander in making this reservation, when the Secretary of the Interior, in April, 1851, approved the lease executed by Capt. E. D. Keyes, on November 27, 1849, to Theodore Shillaber, of this land. This approval is to be taken as having the same effect as if it had been done by the *President himself;* and if the President had himself approved this lease in the manner and in form in which it was approved by Mr. Secretary Stuart, no question, we presume, could arise upon the legal effect and operation of such action of the Executive. It would be taken as in law a ratification of the act of the military governor by which the title was sought to be vested in the United States as against the city, and would be regarded in legal contemplation as equivalent to an antecedent reservation by the President.

Upon the point that the act of the Secretary of the Interior was in law the act of the President, we refer to the familiar rule stated in Wilcox *vs.* Jackson, (13 Pet., 513,) that "the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."

This subject certainly appertained to the duties of the Secretary of the Interior. It related to land owned by the United States, and the subject-matter was peculiarly one within his administrative jurisdiction. The act of March 3, 1807, section 2, expressly places under the control of the Secretary of the Treasury, to whose authority the Secretary of the Interior succeeded, the subject of permitting settlers on lands, ceded or secured to the United States by any treaty or cession, to continue upon such lands. And there are other statutory provisions relative to the subject which rendered it proper for the Secretary of the Interior to act in this behalf for the President, and, through him, on behalf of the *United States*, for whose benefit he *expressly* approved this lease. (Rec. p. 17.)

As to the ratification of the action of the military commander by *Congress*, we refer to the various acts appropriating money for the construction of the marine hospital, which was placed by authority of Congress upon this reservation. The commissioners for the construction of public buildings "selected *Rincon point* as a suitable *site* for a marine hospital." (Rec., p. 19.) And it was with reference to that selection

and that *site* that Congress authorized the expenditure of public moneys, and appropriated moneys to be expended. These acts of appropriation are more fully referred to in a subsequent part of the argument upon the statute of 1853. Finally, when Congress came to relinquish the government title to lands in the city of San Francisco, it excepted from that relinquishment "*all sites* or other parcels of land which have been or now are occupied by the United States *for military, naval, or other public uses.*" This was the act of July 1, 1864, and the language is certainly broad enough to cover this reservation—*this site*—and exclude it from the grant therein made to the city.

We thus say that Congress, as well as the President, has ratified and affirmed the act of reservation made in 1847 by the military governor of California to the extent to which that act was done, and thus the reservation is to be taken as made by authority of law; though we hold that, under the circumstances and conditions under which the military governor acted, it was incumbent on the party denying the validity of this reservation to show affirmatively that it had been disaffirmed by the President or Congress. It is fairly to be implied, from the grant of power to that commander by the President, that he had authority to reserve this land for public use.

2. The city did not acquire any title to the land in question under the act of March 3, 1853, entitled "An act to provide for the survey of public lands in Califor-

nia, the granting of pre-emption rights, and for other purposes."

The eighth section of that act reads as follows: "Section 8. That the *public lands*, not being mineral lands, *occupied as towns or villages*, shall not be subdivided, or subject to sale or to be appropriated by settlers, under the provisions of this act, but the *whole* of such lands, whether settled upon before or after the survey of the same, shall be subject to the provisions of the act entitled 'An act for the relief of the citizens of towns upon the lands of the United States, under certain circumstances, approved May 23, 1844, except such towns as are located on or near mineral lands, the inhabitants of which shall have the right of occupation and cultivation only until such time as Congress shall dispose of the same; *nor shall any lands specially reserved for public uses be appropriated under the provisions of this act.*'"

The effect of this act, and of the act of 1844, therein referred to, was to enable the city to acquire *all* the lands within the charter limits of 1851, with the exceptions and reservations named in the act.

These exceptions and reservations are of all lands which are not "*public lands;*" and also all such lands as were "*specially reserved for public uses.*"

The Van Ness ordinance was passed under the acts referred to, and derives all its force and effect from them.

In pursuance of these acts, the land was entered with the Register of the United States for the city.

The act of the legislature of 1858, confirming the Van Ness ordinance, and the act of Congress of July 1, 1864, both imply the existence of the acts of 1853 and 1844 above mentioned.

The deed of the commissioner of the funded debt, under which the defendants derive their title, according to the decision of the circuit court, derives all its vitality from the same acts of 1853 and 1844, if it has any at all.

If the lots in controversy did not pass to the city under the same acts, followed up by the Van Ness ordinance and the entry of the land within the charter limits, then the United States still hold the title.

But these lots did not pass by the acts referred to.

None but lands which come under the denomination of "*public lands*" did pass. The question, then, is, whether these lots were, at the time of the passage of the act of March 3, 1853, "*public lands*," within the meaning of those words in the eighth section of that act. That is, were these lots, at that time, "*public lands*" of the United States? We submit not; but that they were then, by way of contra-distinction, *private lands* of the United States.

In the month of December, 1852, several months prior to the passage of the act of March 3, 1853, the United States had accepted a deed of the six hospital lots from the city.

The acceptance of this deed, the United States having taken urgent means to procure it, manifests an intention on their part to appropriate these lots to their own private uses. In other words, this deed operated to segregate these lots from what might otherwise be denominated "*public lands.*"

At the time, then, of the passage of the act of March 3, 1853, these lots could not be considered "*public lands.*" Accordingly, they did not pass to the city under the terms "*public lands*" in that act.

It would be strange if the United States, in March, 1853, should have re-transferred to the city these lots, for which they had taken a deed from the city only a few months previously, and on which they were then making extensive preparations to erect a marine hospital.

We submit, therefore, that these lots did not pass to the city under the term "*public lands,*" in the eighth section of the act of March 3, 1853. And if they did not so pass, the title of the defendants has nothing to stand upon.

But there is another clause in this same eighth section of the act of March 3, 1853, deserving of notice. The last clause says: "Nor shall any lands specially reserved for public uses be appropriated under the provisions of this act."

We claim that the deed from the city to the United States did have the effect of specially reserving these lots for public uses within the meaning of the last clause of the eighth section.

But, if such deed did not have that effect, we submit that the other acts set forth in the findings of the various officers of the United States, do have that effect.

These acts are not only of the military officers of the United States on this coast, but of Mr. Stuart, then Secretary of the Interior, approving of the Shillaber lease. This lease, indirectly it may be, but nevertheless effectually, segregates these lands from other public lands, and does have the effect of specially reserving them for the use of the United States; for a large amount of rent is reserved to the United States by this lease, and this we claim renders it a reservation for the public uses of the United States.

It is not to be supposed that Congress, when it passed the act of March 3, 1853, was ignorant of these acts of the military officers and of Secretary Stuart. They had copies of all these documents before them in the published public documents of the government. And is it to be supposed that, with the knowledge of these acts and of the deed from the city, and that the government was taking immediate steps to erect a marine hospital on these lots, Congress intended to transfer them to the city by that act? Such a supposition would be equivalent to an imputation that Congress acted like children.

The prior and contemporaneous and subsequent action of Congress is consistent only on the hypothesis above claimed.

Thus, Congress, in 1850, made an appropriation for

the construction of a marine hospital at San Francisco, (9 Stat. at Large, p. 534,) in the following words: "For the construction of a marine hospital to be located by the Secretary of the Treasury at or near San Francisco, in the State of California, $50,000."

It is true, as said by the circuit judge in his opinion, that this statute does not specify any particular lot or lots as those upon which a hospital was intended to be built; but it does show that, at that early day, Congress had in contemplation the erection of a hospital, and renders it probable, at least, that when the government had selected the lots for that purpose, and had taken a conveyance of them, Congress would not immediately re-transfer them to the grantor, and specially without designating or making some provision for some other lots to be substituted in the place of those so re-transferred.

But another appropriation, made in 1852, nearly a year before the passage of the act of March 3, 1853, is more specific. It is as follows, (10 Stat. at Large, page 87:) "For *completing* the construction of *the* marine hospital at San Francisco, California, and for arranging the grounds, fencing, furnishing warming apparatus, and superintendence thereof, $150,000."

From this statute, one would naturally suppose that Congress had in view some work the character and situation of which were understood as having been definitely determined; or, if this were not so, that provision would be immediately made by the government for de-

termining these matters. And the government did immediately act in pursuance of this appropriation, by procuring a deed from the city, out of greater and more abundant caution, for lots of land which the government might even then have considered as having been effectually reserved and set aside for public uses by the previous acts of its officers.

Further: another appropriation was made in 1854, (10 Stat. at Large, 562,) as follows: "To complete *the* marine hospital at San Francisco, and to enclose the site and drain the same, and for the necessary out-buildings, $44,000."

This statute was not passed until long after the erection of the hospital buildings on these very lots which had been conveyed by the city to the United States had been commenced, and had advanced nearly to completion. It would be strange that Congress should make such an appropriation for the improvement of lots, which, if the construction claimed by the defendants be correct, Congress must have known had been irrecoverably re-transferred by themselves to the city.

Again, we find an act approved March 3, 1857, (11 Stat. at Large, page 242,) making appropriation for defraying expenses of the defence of suits against the United States for lands occupied by marine hospitals, light-houses, &c., in San Francisco.

If Congress had conceived the idea that they had four years before granted away by one of their own acts all the interest of the United States in the hospital

lots, they were acting absurdly in expending money to defend suits brought to recover lands in which they had no interest.

Again, we find another act, approved May 18, 1858, (11 Stat. at Large, page 370,) authorizing the Secretary of the Treasury to settle and adjust the accounts of the contractor for the erection of the United States marine hospital at San Francisco, and to pay such contractor any sums found due him, &c.

If Congress, at the passage of this act, had entertained the least supposition that their own body had given away the lands on which the hospital was built, they would have been likely, when providing for a settlement of the accounts for building, to have intimated some doubt of their title, and to have made some provision for having the matter investigated.

If in any case a legislative construction can be given to a statute, we submit that Congress, by the various statutes referred to, have given a construction to the act of March 3, 1853, by which construction their opinion can only be that the lots in question were not included in the terms "public lands," in the eighth section of that act, or were included in the terms "lands specially reserved for public uses," as mentioned in the last clause of that section.

So much for the act of 1853.

3. The city of San Francisco acquired no title to this land under the act of Congress of July 1, 1864. (13 Stats., 333.)

These lots are situated within the charter limits of the city, as prescribed by the charter of 1851.

The fifth section of the act of Congress of July 1, 1864, makes a final disposition, so far as Congress is concerned, of all claim of the United States to the lands within the charter limits of the city, as laid down in the charter of 1851. The following is a copy of that section:

"SEC. 5. *And be it further enacted*, That all the right and title of the United States to the lands within the *corporate limits* of the city of San Francisco, *as defined in the act incorporating said city*, passed by the legislature of the State of California, *on the 15th of April*, 1851, are hereby *relinquished and granted* to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said State, approved on the 11th of March, 1858, entitled "An Act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city, *there being excepted from this relinquishment and grant all sites or other parcels of lands which have been or now are occupied by the United States for military, naval, or other public uses*, or such other sites or parcels as may hereafter be designated by the President of the United States, within one year after the rendition to the General Land Office, by the Surveyor General, of an approved plat of the exterior limits of San Francisco, as recognized in this section, in connection with the lines of the public surveys: *Pro-*

vided, That the relinquishment and grant by this act shall in no manner interfere with or prejudice any *bona fide* claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof."

This section gives the lands to the city, with certain reservations and exceptions.

Are the lots in controversy embraced within the lands thus given away by this act, or within its exceptions and reservations?

We claim that, construing the language of this section in the light of the circumstances known to exist, the lots in question ought to be deemed as embraced within the exceptions and reservations mentioned in the section quoted.

We are not to suppose that Congress was ignorant of the fact that the government had taken a deed of certain premises, including these lots, from the city, and had thus signified its intention to appropriate them to the use of the government, even if we give no weight to the above mentioned acts of the military officer and of the Secretary of the Interior. Congress must also have known that a hospital had been erected on the same premises described in the deed from the city, and of which these lots are part. Is it a fair construction of this section to say that by it Congress intended to give these lots as a part of the reservation to the city? We think not. These lots certainly constituted a portion of the "*site*"

of the marine hospital, and, if so, they are excepted from the relinquishment and grant.

Upon this hypothesis, these lots do not fall within the ordinance confirmed by the section, (that is, the Van Ness ordinance,) because, before they can be brought within the provisions of such ordinance, they must necessarily be embraced within the lands granted and relinquished, instead of coming within the influence of the exception; consequently, the claim of the defendant cannot be helped by the Van Ness ordinance.

Nor is the defendant's claim helped by the *proviso* of this 5th section. The *proviso* is, that the *relinquishment and grant* by this act shall not interfere with or prejudice, &c. The *proviso* does not apply at all to such lands as might be deemed to fall within the *exception*. The proper construction of the proviso being that, as between the city claiming under this grant and third persons claiming *bona fide* adversely, the grant shall not prejudice such claims; but it leaves the claims of third persons as against the United States to lands falling within the *exception* untouched and unaffected.

But there is another consideration arising out of this section. We believe that no approved plat has been returned by the Surveyor General to the land office, as contemplated by the section. Until the expiration of the year specified, the government has the power of making such reservations as it pleases. So long as this privilege exists, no one can defend against the United States This privilege of choice extends to all the lands

within the charter limits, and the United States may recover any of such lands until the time for exercising that choice shall have expired. It has been decided that where a Mexican grantee was entitled to choose a limited quantity of land out of a larger tract, until such choice had been definitely determined, the grantee might sue for and recover the entire tract to the extent of the external boundaries. We do not see why the principle is not general and applicable to the present case.

The deed from the commissioners of the funded debt to the defendants has no force or validity, unless the land passed from the United States by virtue of the Van Ness ordinance, which derives its vitality from the acts of Congress of 1853 and 1844; nor does the possession of the defendants give them any right, save on the same supposition of the Van Ness ordinance covering these lots, which it does not.

SECOND POINT.

If the city ever had any title to these lots, it was transferred to the United States by deed dated December 11, 1852, which conveyed a title prior and superior to that under which the defendants claim.

1. The only title held by the defendants under the city of San Francisco, relied upon by the circuit court as being valid and in conflict with the title of the United States, derived under the conveyance from the city of San Francisco, dated December 11, 1852, is the *third* (see Record, p. 24) arising "by virtue of a conveyance

by the city through the commissioners of the sinking fund created in 1851, and the commissioners of the funded debt, created in 1851."

The facts in relation to this branch of the defendant's title are contained in numbers 20, 21, 22, and 23 of the findings of fact by the court, (see Record, pp. 10, 11,) and in the opinion of the court, (ib. pp. 24, 26.)

By this statement of facts, it appears that the title of defendants under the city, now relied upon, originated under the Van Ness ordinance passed by the city in June, 1855, confirmed by the legislation of California in 1858, and under a conveyance to them by the commissioners of the funded debt, of such title as they had made under the provisions of the act of April 14, 1862, authorizing compromises with settlers and claimants under the Van Ness ordinance—titles, all subsequent in point of date to the conveyance made by the city of its title to the United States.

It is admitted by the court, that it has been held by the courts of California that there was no authority in the common council of the city, under the charter of 1850, to create the board of commissioners of the sinking fund, or to execute a conveyance of the city property to them, (Record, p. 26.) On this point see Smith *vs.* Morse *et al.* 2 Cal. Rep. 524, affirmed by Heydenfeldt *vs.* Hitchcock, 15 Cal. Rep. p. 514. Ellis *vs.* Eastman, 32 Cal. Rep. p. 447.

If, therefore, the conveyance of the land in question by the city to the commissioners of the sinking fund was

void, *the title thereto necessarily remained in the city of San Francisco.*

But it is argued, that notwithstanding the fact that no title passed from the city to the commissioners of the sinking fund, the city title passed to the commissioners of the funded debt, by virtue of a conveyance from the commissioners of the sinking fund to the commissioners of the funded debt, under the 12th section of the act of May, 1851, entitled "An act to authorize the funding of the floating debt of the city of San Francisco, and to provide for the payment of the same."

This may be doubted, although we admit that it has been so decided by the supreme court of California. The section of the act just referred to, was passed to transfer the title of the city from the commissioners of the sinking fund, to the commissioners of the funded debt, on the supposition that the city title had already been vested in the commissioners of the sinking fund. That this was its intent, and its sole purpose, will be seen from an examination of its terms, as follows, viz:

"SEC. 12. The commissioners of the sinking fund, created by ordinance of the common council, are hereby required to convey to the commissioners of the funded debt of the city of San Francisco, created by this act, on their application therefor, all the property and all the rights, titles, and interests in property belonging to said city, and to pay over into the hands of said commissioners any funds, notes, securities, or other assets belonging to said city which they may have received, or may here-

after receive, by virtue of article third of an act entitled 'An act to incorporate the city of San Francisco,' approved April 14, 1851. Said commissioners shall have the right, at such time and place as in their discretion the interest of the city may require, to expose at public sale, or to lease the property to be conveyed, as provided in this section; and they shall apply the proceeds of such sale or lease to the liquidation of the floating debt of said city." (Stat. of California, second session, 1851, p. 390.)

It had not then entered into the contemplation of the legislature that the title of the city of San Francisco to the property in question had not been vested by valid conveyance in the commissioners of the sinking fund. On that basis, therefore, they even decided to convey their title to the commissioners of the funded debt. But it needs no argument to show that if they had no title they could not convey any, nor could an act of the legislature authorize parties having no title to convey one. The commissioners of the sinking fund, therefore, conveyed to the commissioners of the funded debt such title and only such title as they had; which, as we have already seen, was no title whatever.

It was only after this discovery that the new theory wasstarted that by this act of the legislature the commissioners of the sinking fund were made the agents of the city for transferring its title to the commissioners of the funded debt. This is evidently an afterthought intended to supply an omission, and to supply a defect in the title

of the commissioners of the funded debt. But the courts of the United States are not bound by this interpretation. They have a right to interpret this law for themselves, and now especially when the effect of the erroneous interpretation is to deprive the United States of valuable property held by them under a grant from the city of San Francisco made while the legal title still remained in the city.

If, therefore, by a correct interpretation of this statute, the title shall still remain in the city, then, that title was conveyed to the United States by the deed of December 11, 1852, and the United States entering and holding the six lots conveyed by the same title, is clearly entitled to recover the two lots in question, under the city title thus conveyed. The adverse possession of the defendants and the lapse of time, are no bar to the recovery of the United States. "*Nullum tempus occurrit regi.*"

2. But suppose that the title of the city to the land in question, did pass from the city to the board of commissioners of the funded debt, in the manner contended, nevertheless, we contend that the commissioners held it only as trustees, to be used by them only for such trusts, and that the title would return to the city on the fulfilment of the trust. "Although the legal title as in other cases of trust deeds for the security of the debt was in the trustees, the equity of redemption and the residuum, after the satisfaction of the trust debts, was in the city. The city could

still sell or dispose of this residuary interest, could take care of and preserve the estate, and perhaps could go *into possession of it*, subject only to the superior right of the commissioners, so long as the debts were unpaid." Board of Education *vs.* Fowler, 19 Cal. Rep. p. 23.

By this case it was decided, that the city of San Francisco, under the charter of 1851, had the power by resolution of the two boards of aldermen, to reserve certain lots in question from sale, and keep them for school purposes, subject only to the superior title of the commissioners of the funded debt, and that this reservation was good as against a party who had been in the adverse possession of them under the Van Ness ordinance of 1855: in other words, that the *prior* reservation or disposition made of them by the city was valid as against a *subsequent* trespasser, claiming title under the Van Ness ordinance against the city and the commissioners of the funded debt.

"In Hubbard *vs.* Sullivan, (18 Cal. Rep., 508,) it was also held that *a possession by the direct permission of the city*, before the passage of the Van Ness ordinance, was such a possession as protected the possessor against any claim arising from a previous occupancy of the premises by a claimant who at the time of such occupancy was a mere trespasser; and that the city, having the equity of redemption, might have entered upon the property and used it, subject only to the paramount claim of the commissioners of the funded debt holding

the legal title, and that a party entering without objection under her could not be disturbed in that possession by a third person, any more than the city through whom he claimed." (19 Cal. Rep., pp. 25, 26.)

We claim that the United States entered into constructive possession of the two lots in question under the deed from the city of San Francisco; that their possession was coextensive with the extent of their grant; that the title of the defendants is *subsequent* and *subordinate* to the prior title or right of occupancy granted by the city to the United States; that they entered into possession with the knowledge and implied consent of the commissioners of the funded debt, who were only *trustees* for the city, and that large and valuable public buildings were erected thereon for the use of the United States, and that inasmuch as it is not found that it was necessary for the commissioners of the funded debt to disregard the prior disposition made of these lots by the city in order to pay the debts of the city, the prior right of occupancy conferred by the city on the United States, must prevail against the defendants.

E. R. HOAR,
Attorney General.
J. HUBLEY ASHTON,
Special Counsel of U. S.

In the Supreme Court of the United States.

DECEMBER TERM, 1868.

UNITED STATES, *Plaintiffs in Error*,
vs.
CHARLES HARE, *et al.*
} No. 215.

In error to the Circuit Court of the United States for the District of California..

SUPPLEMENTAL BRIEF OF UNITED STATES.

The principal brief on behalf of the government was prepared without knowledge of the special grounds upon which the defendants intended to place in this court their claim of title to the property in question.

It was thought, therefore, by the counsel of the United States, that the brief of the government should contain a statement of all the sources from which the alleged title of the defendants might be supposed to be derived. In this view, the counsel for the government have contended in their brief, under the *First Point*, that the city of San Francisco (through whom the defendants claim title) acquired no title to this property, either

1*st.* By the decree of the circuit court in the *Pueblo case*, (Brief pp. 2 to 12;) or

2*d*. By the *town-site* act of March 3, 1853, under which the city entered at the land office the lands within its corporate limits. (Brief pp. 12 to 19;) or

3*d*. By the 5th section of the act of July 1, 1864, which relinquished to the city the title of the United States to the lands within the corporate limits of 1851. (Brief pp. 19 to 23.)

And in reference to the *paper titles* of the United States and the defendants, the counsel have contended, under the *Second Point* of the brief, that the United States have a title to these lots, by their deed from the city of 1852, which must prevail against the subsequent conveyance of the premises to the defendants by the commissioners of the funded debt. (Brief pp. 23 to 29.)

The special theory of their title now advanced by the defendants in their brief seems to be, that the title of the city to the demanded premises depends, and is founded, upon the 5th section of the act of July 1, 1864. They do not repudiate, it is true, the theory of title under the decree in the Pueblo case, but their reliance appears principally to be placed upon the terms of the act of 1864.

In our brief, we have met the argument of defendants, that these lots were not *intended* by Congress to be excepted from the grant made to the city by that act. (Brief p. 21.)

We hold that the exception in the 5th section of the act of 1864, properly construed, is of *all military, naval, or other public sites;* that the six lots conveyed by the city of San Francisco to the United States in December, 1852, constitute the *site* of the marine hospital; and that those six lots are, therefore, excepted from the grant made to the city.

The commissioners of the United States selected Rincon Point "as a suitable site for a marine hospital," (Rec., p, 19.) and thereupon the United States accepted a deed from the city for *six lots* at that point, and built the hospital upon two of them. It was thus intended that the site of the hospital should be co-extensive with these premises. A rule which would require a physical occupation of all the lots, in order to bring them within the exception in the 5th section of the act of 1864, would deprive the government of the *third* and *fourth* lots, which are not covered by the hospital at all. The rule for the construction of the grant made in the act of 1864 is as old as the common law itself. The *King's grants* have at all times been construed most favorably for the King, and *against the grantee;* contrary to the manner in which other assurances are construed. (Plowden, 243.)

The present grant was in a case of mere bounty or donation, and not founded upon any consideration whatever. The United States made a free gift of its title to the city. This principle was profoundly considered by Chief Justice Taney in the case of the Charles River

Bridge *vs.* The Warren Bridge, 11 Pet. 420. This court laid down the same rule for construing public grants by statute in Mills *vs.* St. Clair county, 8 How. 569.

In addition to what is said in the principal brief and the above remarks, we desire to make a few observations.

First. This court has solemnly and judicially determined that the title of the city of San Francisco to the lands within her corporate limits "*rests upon the decree of the circuit court as modified by the Act of Congress,*" (of March 8, 1866.)

We give the very words of the opinion of the court, as delivered by Mr. Justice Field in GRISAR *vs.* MCDOWELL. (6 Wallace, 379.)

This is a point not now, we suppose, open to dispute. Nor can there be any question raised as to the meaning of the court. We give its language; and it is clear and unequivocal to the point, that the title of the city, and, therefore, of these defendants, rests upon the decree in the Pueblo case and the act of 1866.

Second. If this be true, then the question—the *only* question—here, is as to the construction of the Pueblo decree and the act of 1866. We have nothing to do

with the act of 1864. And this was evidently the view of the learned circuit judge, who relies wholly in his opinion on the decree, and does not refer even to the act of 1864.

Third. If the decree in the Pueblo case is the foundation of title to this property, as this court has said it is, and the property is not within the exception, the decree expressly confirms these premises to the city in trust for the benefit of the United States. The language of the decree is, "this confirmation is in trust for the benefit of the *lot holders* under *grants* from the pueblo, town, or *city of San Francisco*, or other competent authority." (Rec. p. 9.) The United States is a lot holder under a *grant* (made December 11, 1852,) from the city of San Francisco, and comes within the very letter of the decree.

This, it will be observed, is upon the theory that the lots are within the confirmation, and not excepted out of the confirmation as land reserved or dedicated to public uses.

If the land is *within* the confirmation, we have a good title to it under the decree, as a lot holder under a grant from the city.

Fourth. Approaching now the exception, of land reserved or dedicated to public uses, and the true construction of that exception, we have contended that if, in *point of fact*, this land had been reserved or dedicated to public use, whether or not it was by *sufficient authority*

so reserved or dedicated, it comes within the exception, and is saved by the decree to the United States.

And here again we employ, in the statement of our proposition, the identical language of the court in Grisar *vs.* McDowell, (6 Wall. 382.)

We give the words of Mr. Justice Field, in order that there may be no doubt on this point. He says, speaking for the court:

"On the other hand, if the lands were at the time a part of the public domain, as they must be considered to be, because they have been excluded from the lands confirmed to the city in satisfaction of the claim, *it is of no consequence to the plaintiff whether or not the President possessed sufficient authority to make the reservation in question.* * * * *

"It is sufficient, as we have already said, that the lands remained the property of the United States, *whether or not they were by sufficient authority appropriated to public uses.*" (6 Wall. pp. 380, 382.)

The whole doctrine of this opinion is, that if there was a *de facto* reservation of the land there in question, the land fell within the exception.

The court further say, that by "*competent authority,*" in the act of March 3, 1853, is meant the authority of the President, *and officers acting under his direction.* (6 Wall. 381.)

We say that Col. Mason, who made this reservation, must be presumed, under the circumstances of the case, to have acted under the direction of the President.

And then, as if to complete the argument which we have applied in this case, the court concludes:

"The action of the President, in making the reservations in question, was *indirectly approved* by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them." (6 Wall. 381.) The same *indirect approval* of the action of the military governor in making *this* reservation was given by Congress in the acts appropriating money for the construction of the marine hospital upon a portion of it.

We also desire to refer the court, upon the point of the sufficiency of a *de facto* reservation to exclude and except lands from a grant of the legislature, to the decision of the court in the case of WOLCOTT *vs.* DES MOINES CO., 5 Wallace, 688.

This case is referred to in the opinion in *Grizar vs. McDowell*, and is an authority directly in support of the *first proposition* of our brief, that the question under the Pueblo decree is, whether this land was *in fact* reserved for public use, and not whether it was a *de jure* reservation made under express authority of law.

Fifth. It is to be observed that the confirmation in the decree of the circuit court is to the city of San Francisco, and not to the commissioners of the funded debt. The city filed the claim in 1852, before the land board, by *her* attorney, J. A. McDougall. (Dwinelle's Colonial History of San Francisco, Addenda, p. 121.) The appeal to the district court was taken by the city.

The case was removed into the circuit court by the city. The decree was made for the city. The grant in the act of 1864 was in favor of the city, and so was that made in the act of 1866, on which the appeal to this court was dismissed.

If this land is not excepted from the decree, then to the United States should be accorded all the benefit of the decree as a lot-holder under the city.

Sixth. We contend, if all this is not true, that the legislature of California had no constitutional power, either by the act of March 11, 1858, approving the Van Ness ordinance, or the act of April 14, 1862, authorizing the commissioners of the funded debt to compromise certain claims to real estate, or by both acts of its legislation, to direct, control, or dispose of this property, if it was bound by private contract or conditions of dedication or endowment.

The legislature had no authority to violate the obligation of any such contract in respect of the municipal property of San Francisco, or defeat any dedication which may have been made of it to public use.

The whole transaction between the United States and the city, beginning with the grant of beach and water lots by General Kearney to the town of San Francisco, in 1847, and ending with the deed from the city to the United States, shows a definite contract between the parties for the reservation of this property, and an actual reservation of it by both parties, for a charitable use of high national interest and importance. And we deny

that it was in the power of the legislature of California to alienate property thus situated, or to vest the title to it in anybody against the public. (New Orleans *vs.* United States, 10 Pet., 726.)

Seventh. The defendants have no equities that entitle them to consideration or protection. It is not found that they ever paid a dollar for the property.

They or their grantors got into possession at a time when the United States were attacked on all hands, as the record shows, by squatters, under a void conveyance by a justice of the peace, [redacted] (Townsend *vs.* Greeley, 5 Wall., 336;) obtained a sheriff's deed, which, as this court has decided, passed no title whatever, (Townsend *vs.* Greeley, 5 Wall., 336;) and upon the basis of the *accident* of possession at the passage of the Van Ness ordinance, obtained the recognition of the commissioners of the funded debt, and, through them, claim the benefit of the confirmation of the city's title. During the entire period of their possession, they knew that the land had been reserved, and had been actually conveyed by the city, under whom they claim, to the government, and that they were trespassers. While, on the other hand, the United States claim under a reservation made with the consent of the organized town of San Francisco, for a *consideration* no less than the value of all the beach and water lots given at the time by General Kearney to the town for sale for its benefit, and under a conveyance

executed by authority of the incorporated city herself, with knowledge of the intention of the government to appropriate it to beneficent public uses.

It would be strange, indeed, if the United States, as really *bona fide* purchasers of the city's title, and holders of the city's deed for the property, should be postponed to parties who have no scrap of paper title from the city, and who have no equitable claim to any.

E. R. HOAR,
Attorney General.

[redacted]BLEY ASHTON,
Special Counsel of U. S.

IN THE

Supreme Court of the United States.

No. 215.

THE UNITED STATES, *Plaintiffs in Error*,

vs.

CHARLES HARE, SAMUEL W. HOLLADAY, AND GEORGE F. SHARP, *Defendants.*

BRIEF FOR DEFENDANTS.

S. W. HOLLADAY,
BLAIR & DICK,
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IN THE

Supreme Court of the United States.

No. 215.

THE UNITED STATES, *Plaintiffs in Error*,

vs.

CHARLES HARE, SAMUEL W. HOLLADAY, AND GEORGE F. SHARP, *Defendants.*

In error to the Circuit Court of the United States for the District of California.

Brief for Defendants,

By S. W. HOLLADAY, in person.

The United States commenced this suit to recover from defendants the possession of the land described in the complaint, situated in the city of San Francisco.

The suit was commenced December 10, 1866, and the complaint alleges that the defendants are in the possession, which they withold from plaintiffs.

The record shows (fol. 14) that defendants' claim of title had its inception in December, 1849, (seventeen years before this suit was commenced,) and that the grantors of defendants entered upon the premises in the spring of 1850, claiming said land as their own, under grants thereof, and that they and the defendants have

NOTE.—The numbers from 1 to 6 inclusive, as used herein, refer to diagram at page 3 of the record.

been in the possession, claiming the land as their own, ever since.—(18th Finding, folio 14.)

The land titles in San Francisco having been a subject of conflict and uncertainty, the defendants' grantors, in August, 1851, purchased the city title to said land, at sheriff's sale under an execution, (fol. 14 and 15, p. 10,) which latter some at the time contended was a valid title, and our Supreme Court so held till the decision of Hart v. Burnett in 1860.—(15 Cal. Reports, 530.)

In the year 1855, the city, by its ordinance No. 822, (popularly called the "Van Ness ordinance,") granted all her rights in this land to defendants, who were then in the actual possession thereof.

In March, 1858, the legislature of California added its sanction to said ordinance, as will be seen by reference to the statutes of California for the session of 1858, page 52, *where said ordinance is printed at length, and in all things confirmed.*

Under an act of the legislature of the year 1851, such title as the city then had in this land was vested in the Commissioners of the Funded Debt of the City of San Francisco, by deed of May 24, 1851.—(20th Finding, page 10.)

The legislature of California, April 14, 1862, (Statutes, p. 217,) passed an act authorizing the commissioners named in the last finding to convey the title to those still in actual possession of land since the first of January, 1855.—(22d Finding, fol. 17.)

Pursuant to the provisions of the last-named act those commissioners took proofs, adjudicated the subject, and found as a fact that defendants were in actual posssession of the demanded premises January 1, 1855, as purchasers in good faith, and that they were still in the actual possession, and thereupon they executed and delivered deeds of conveyance to defendants of lots 5 and 6, composing the demanded premises, all prior to the commencement of this suit.—(Fol. 17, Finding 22.)

The defendants being found in possession are presumed to be rightfully there. The presumption is strengthened when that possession is based upon a *bona fide* claim of title for seventeen years prior to the commencement of suit; and still is the presumption further strengthened when it is shown that defendants have occupied, all that time, in good faith as purchasers under public ordinances of the city and acts of the legislature, and have, also, to secure their repose, purchased all the claims and titles that were known, of record or by the legal profession, to exist.

As a fact in the case it appears (p. 11, Finding 23) that all the right, title, and interest, legal and equitable, of the city of San Francisco in the demanded premises was vested, by deeds of conveyance, in the defendants.

For all legal purposes the defendants might start with this 23d Finding as a basis, without reference to the preceding facts found, which defendants allude to merely in proof of their ancient and *bona fide* claim to and actual possession of the land.

Then the controlling question arises, what title had the city of San Francisco to this land which thus passed to and vested in defendants?

On the answer to this question turns the decision of this case.

In the preceding remarks we have alluded to the "Van Ness ordinance," passed by the city of San Francisco and confirmed by the legislature of California April 11th, 1858.—(p. 52, acts of that year.)

Congress saw fit to reaffirm that law by the act approved July 1, 1864, entitled "An act to expedite the settlement of titles to land in the State of California."—(Vol. 13, U. S. Statutes at Large, p. 332.)

Section 5 of that act gives and grants to the city of San Francisco all the right, title, and interest of the United States to the lands within the corporate limits of the city, as defined by the act of incorporation, passed

in 1851, (the same as the Van Ness ordinance limits,) for the uses and purposes specified in the Van Ness ordinance, as approved by the legislature April 11, 1858, excepting from the grant "all sites or other parcels of land which have been or now are *occupied* by the United States for military, naval, or other public uses."

This act grants the land in dispute to the defendants, for it is clear, from the whole record, that this land was in the *actual use and possession* of the defendants (fol. 14–17) from 1850 down to the time of the trial, August 12, 1867.

As two bodies cannot occupy the same space at the same time, it follows that these lots, at the passage of the act of 1864, were not *occupied* by the United States in any manner.

The act of Congress of July 1, 1864, is a legislative grant, unconditional, and is a higher evidence of title than a patent to the defendants directly, and by name.

2d Howard, 319–344.

Grignon's Lessees vs. Astor.

Defendants might stop here and rest their defence upon the fact of their own actual possession, with title derived from the city, with the act of Congress giving the land to the city for the use of her grantees, as prescribed in the ordinance.

But the findings in this record go further, and show that the city claimed a tract of land in July, 1852, and preferred her claim to the United States Land Commissioners for confirmation. This claim resulted in a final confirmation by the United States Circuit Court, May 18, 1865, in trust for the benefit of the lot-holders under grants from the city. "The claim so confirmed included the premises in controversy," (Fol. 11, p. 8, and fol. 14, p. 9, Transcript,) "subject to the following deductions, namely: such parcels of land as have been heretofore reserved or dedicated to public uses by the United States."

It is not pretended by plaintiffs' counsel that this land was ever "reserved." It cannot be said to have been "dedicated to public uses by the United States," unless the adverse holding by defendants for nearly twenty years can benefit the plaintiffs. The grant by Congress was in 1864, while the decree of confirmation was not till the next year, 1865. The latter certainly could not control the former.

It so happens that the same learned judge who pronounced the decree of confirmation, also subsequently tried this cause and signed the findings.

He certainly understood his own meaning in the language employed in the "deductions" contained in his decree—"reserved or dedicated to public uses."

He having heard all the proofs was satisfied, and so finds, that this land was never reserved, nor had it ever been *dedicated* to public uses by the United States.

On the contrary, he finds that there was no dedication to public uses by the United States of any part of Rincow Point, except the spot on which they built the hospital, and that all the rest was confirmed to the city by, and not excepted from, the decree.—(Folio 18, 2d Conclusion.)

The record shows that the President did reserve seven parcels of land in and about San Francisco, (16th Finding, p. 7,) but he never did reserve this.

The city title to this land passed to the Commissioners of the Funded Debt in 1851.—(p. 10, finding 20.)

Plaintiffs *subsequently* procured a deed of conveyance of six lots of the same land from the city, and entered upon four of them only, and not upon these.—(p. 7, Findings 14 and 15.)

Thus it appears that there never was an actual appropriation or occupation of these two lots by plaintiffs, while the contrary appears as to defendants.

The city title passed to defendants under the Van Ness ordinance.

Thus the Commissioners of the Funded Debt conveyed the naked fee to defendants. The act of Congress, July 1, 1864, granted the title to the city for the uses and purposes specified in said ordinance, excepting only the lots "occupied" by the United States. These lots are not within the exception.

The decree of confirmation of the city title is substantially the same as the act of Congress as a grant; the court finds as a fact that the defendants are invested with all the title the city *ever had* to these lots.

The city conveyed these lots to the Commissioners of the Funded Debt in 1851 in trust to pay certain debts.

The next year, 1852, the plaintiffs procured a deed from the city for six lots, after which (15th Finding, folio 10,) plaintiffs entered upon numbers 1, 2, 3, and 4, but not upon 5 and 6, (the subject of this suit,) which were then in possession of defendants, with prior title from the common source, the city.

RESUMÉ.

1. Defendants entered in 1850 under color of title under grants which at the time were considered legal and valid.

2. Afterwards defendants purchased another city title at sheriff's sale.

3. The Van Ness ordinance gave the city title to defendants in 1855.

The Commissioners of the Funded Debt conveyed the legal title to defendants in 1863 by direction of the legislature.

4. The act of Congress, July 1, 1864, gave the title to defendants.

5. The subsequent decree of the Circuit Court, May 18, 1865, gave the title to defendants.

6. The land never was reserved by the United States.

7. It was never appropriated to public use by the United States, by actual use or occupation thereof, for the exclu-

sive and actual use of the land has always been in defendants, adversely to plaintiffs.

8. The deed under which the plaintiffs claim the land is from the same source, but subsequent in date to the deed under which defendants claim.

9. Under these facts the act of Congress is decisive and vests the title in defendants.

So in any aspect of the case under the facts and history thereof, as contained in the record, the title is in the defendants, and we submit that the judgment should be affirmed.

S. W. HOLLADY,
Attorney for Defendants.

August 16, 1869.

In addition to the foregoing we submit that as the plaintiffs claimed to recover the lot because it fell within the exception of the 5th section of the act of 1st July, 1864, their title depended on a question of fact, which was found against them by the court sitting as a jury, and is not subject to review here.

BLAIR & DICK,
For Defendants.